88-60

No. 88-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

OHIO POWER COMPANY AND ORMET CORPORATION,
Petitioners,

v.

LEE M. THOMAS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the U.S. Environmental Protection Agency is precluded by the Administrative Procedure Act from promulgating a retroactive legislative regulation that revokes an order issued by EPA granting rights under § 123(c) of the Clean Air Act, 42 U.S.C. § 7423(c) (1982), when § 123(c) does not provide for revocation, expiration, or reevaluation of § 123(c) orders and does not explicitly authorize EPA to adopt such retroactive regulations?

PARTIES TO THE PROCEEDINGS

This case involves challenges to final regulations promulgated by the United States Environmental Protection Agency (EPA) pursuant to § 123 of the Clean Air Act, 42 U.S.C. § 7423 (1982). Petitioner Ohio Power Company was petitioner in No. 85-1556, and Petitioner Ormet Corporation was petitioner in No. 85-1558.* Other petitioners below were the Natural Resources Defense Council and Sierra Club (No. 85-1488), the States of New York, Rhode Island, Connecticut, Vermont, Maine, and New Hampshire, and the Commonwealth of Massachusetts (No. 85-1489), the State of New Jersey (No. 85-1554), Environmental Defense Fund (No. 85-1552), Alabama Power Co., *et al.* (No. 85-1543), National Coal Association (No. 85-1560), Monongahela Power Co. and Potomac Edison Co. (No. 85-1557), and United Mine Workers of America (No. 85-1568). Lee M. Thomas, Administrator of the United States Environmental Protection Agency (EPA), and EPA were Respondents in all of these proceedings. The proceedings were consolidated on October 25, 1985.

Intervenors on behalf of Respondents below were Alabama Power Co., *et al.* (Nos. 85-1488, 85-1489, 85-1552, 85-1554), American Paper Institute and National Forest Products Association (intervenors on all petitions), National Coal Association (Nos. 85-1488, 85-1489, 85-1552, 85-1554), Kennecott (Nos. 85-1488, 85-1489, 85-1552), the Natural Resources Defense Council and Sierra Club (intervenors on all petitions except No. 85-1488), and the State of Ohio (No. 85-1488). Participating as *amici curiae* in support of Respondents on certain issues raised

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* The parent corporation of Ohio Power Company is American Electric Power Company, Inc. Affiliated corporations are Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, and Kentucky Power Company. Ormet Corporation is a wholly owned subsidiary of Ohio River Associates, Inc. This information is provided pursuant to Rule 28 of the Court.

in Nos. 85-1488, 85-1489, 85-1552, and 85-1554 were the States of Indiana, Mississippi, and Georgia.

Two other consolidated petitions for review, one filed by Petitioner Ohio Power Co. (No. 86-1331) and the other filed by Petitioner Ormet Corporation (No. 86-1362), were decided in the same judgment of the court below as the preceding petitions. These two petitions, which were not consolidated with Nos. 85-1488, *et al.*, sought review of EPA's denial of an administrative petition for reconsideration of certain of the § 123 regulations. The Respondents in that proceeding were also Lee M. Thomas, Administrator, and EPA. The Natural Resources Defense Council and Sierra Club intervened on behalf of EPA in both petitions.

Pursuant to Rule 19.6 of this Court, all petitioners, respondents and respondent-intervenors below other than Petitioners here are Respondents in this Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Ohio Power Company and Ormet Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on January 22, 1988.[1]

OPINION BELOW

The opinion of the U.S. Court of Appeals in *Natural Resources Defense Council, et al. v. Thomas, et al.*, Nos. 85-1488, *et al.* (D.C. Cir. January 22, 1988), is reported at 838 F.2d 1224. A copy of the opinion appears in the Appendix (hereinafter referred to as "App. ——") at 1a-64a.

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[1] The court below had jurisdiction of these cases under § 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1) (1982), which provides the District of Columbia Circuit with exclusive jurisdiction to review any "nationally applicable regulations . . . promulgated by the Administrator . . . ."

JURISDICTION

The judgment of the U.S. Court of Appeals for the D.C. Circuit was entered on January 22, 1988. Three timely Petitions for Rehearing and Suggestions for Rehearing En Banc, and two timely Petitions for Rehearing, were denied on April 13, 1988, App. 65a-68a. This petition for a writ of certiorari is being filed within ninety days of that date pursuant to 28 U.S.C. § 2101(c) (1982) and Rules 20.2 and 20.4 of this Court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are set forth in the Appendix:

1. Clean Air Act §§ 110(a)(1)-(a)(2)(K), 123, 42 U.S.C. §§ 7410(a)(1)-(a)(2)(K), 7423 (1982), App. 172a-177a.
2. 49 Fed. Reg. 44878-44887 (1984) (Proposed Stack Height Regulations), App. 134a-171a.
3. 50 Fed. Reg. 27892-27907 (1985), recodified at 40 C.F.R. §§ 51.100(ff)-(kk) (1987) (Final Stack Height Regulations), App. 71a-133a.
4. Administrative Procedure Act §§ 4, 10(e), 5 U.S.C. §§ 553, 706 (1982), App. 178a-180a.

STATEMENT OF THE CASE

This case involves the scope of the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.* (1982), proscription on retroactive legislative rulemaking. As explained below, the U.S. Court of Appeals for the D.C. Circuit did not find that the relevant statutory provision authorizes EPA to revoke past § 123(c) orders, and the court acknowledged that EPA's rule revoking these orders applies retroactively. The court nevertheless held that the APA's general proscription against retroactive

legislative rulemaking does not apply to this retroactive rule.

The issue of whether the APA proscribes retroactive legislative rules that attempt to undo past transactions is currently before this Court in *Bowen v. Georgetown University Hospital*, No. 87-1097 (hereinafter referred to as "*Georgetown*"). This Court may confirm in *Georgetown* that the APA proscribes such retroactive legislative rules, or may apply the common law rule that statutes (and regulations implementing those statutes) are presumed to have only prospective effect absent explicit congressional authorization to the contrary. If so, the Court should grant certiorari in this case and reverse the D.C. Circuit, because the D.C. Circuit's decision in this case cannot be reconciled with the APA proscription or the common law presumption. On the other hand, this Court may resolve *Georgetown* without reaching the APA issue. If so, this Court should grant certiorari in this case in order to decide whether, absent an explicit statutory authorization, the APA prohibits retroactive legislative rules that upset past administrative transactions.

I. THE STATUTORY CONTEXT OF THIS CASE

The Clean Air Act [2] establishes a system of air quality regulation that is based upon "National Ambient Air Quality Standards" ("ambient standards") and "Prevention of Significant Deterioration" increments ("PSD increments").[3] Under § 110 of the Act, the states must set

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[2] 42 U.S.C. § 7401, *et seq.* (1982) (hereinafter referred to as "CAA" or "the Act"). For convenience, all further citations will be to the Act. Parallel citations to the U.S. Code are given in the Table of Authorities.

[3] The ambient standards define maximum ground level concentrations of pollution which, if attained, will assure protection of public health and welfare. CAA §§ 108, 109. The PSD increments define the maximum increases in ground level concentrations that are allowed to occur as a result of new construction in areas where the ambient standards are met. CAA § 163.

emission limitations for individual industrial facilities (i.e., "sources") to ensure that their emissions will not cause or contribute to ground level pollution concentrations that exceed the ambient standards or PSD increments.

Dispersion of emissions from the point of release to ground level where people breathe is integral to the operation of the § 110 state programs. If emissions from an industrial fuel burning facility were released at ground level, they could create pollutant concentrations that exceed ambient air quality standards and PSD increments by factors of many thousands.[4]

By including § 123 in the 1977 Amendments to the Act, Congress recognized that reliance on dispersion is a legitimate and necessary aspect of achieving the ambient standards and PSD increments at ground level. On the other hand, Congress was concerned that excessive reliance on dispersion might be used by regulated sources to avoid reducing the volume of pollutant emissions.[5] To preclude excessive reliance on dispersion, Congress in § 123 directed EPA to develop a program similar to one previously proposed by EPA in 1973[6] that would limit the use of dispersion "credit" for setting emission limits to that provided by stack heights conforming to "good engineering practice" ("GEP stack height").

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[4] For example, if the emissions from a well-controlled source (e.g., a power plant meeting the stringent EPA new source standards) were released at ground level, they would create ambient concentrations of sulfur dioxide (SO_2) in the range of 900,000 micrograms per cubic meter in the vicinity of the source. By comparison, the primary (public health) ambient standard for SO_2 is 365 micrograms per cubic meter (24-hour calendar day average), and the Class II PSD increment is 91 micrograms per cubic meter (24-hour calendar day average). 40 C.F.R. §§ 50.4, 51.166(c) (1987).

[5] H.R. Rep. No. 294, 95th Cong., 1st Sess. 81-93 (1977).

[6] 38 Fed. Reg. 25697 (1973).

GEP stack height is defined in § 123(c) of the Act as

> the height necessary to insure that emissions from the stack do not result in excessive concentrations of any air pollutant in the immediate vicinity of the source as a result of atmospheric downwash, eddies and wakes which may be created by the source itself, nearby structures or nearby terrain obstacles (as determined by the Administrator).

Congress in § 123(c) explicitly limited GEP stack height to 2.5 times the height of the source ("2.5H"), "unless the owner or operator of the source demonstrates, after notice and opportunity for public hearing, to the satisfaction of the Administrator, that a greater [stack] height is necessary" to ensure against excessive pollutant concentrations due to downwash.

If such a "§ 123(c) demonstration" is conducted by a source and approved by EPA, that demonstrated stack height constitutes GEP stack height for that source. Section 123 does not provide, either explicitly or implicitly, for the revocation, expiration, or periodic reevaluation of § 123(c) GEP credits approved by EPA.

II. OHIO POWER'S § 123(c) DEMONSTRATION

Soon after Congress enacted § 123 in 1977, Ohio Power Company recognized that atmospheric downwash of emissions from its Kammer Plant, caused by wind blowing over nearby hilly terrain, would be severe if GEP stack height for Kammer were limited to 2.5H. Accordingly, Ohio Power in October 1977 initiated a § 123(c) demonstration to determine the stack height needed to ensure against excessive pollutant concentrations caused by downwash. Because regulations had not yet been promulgated regarding how to conduct such a demonstration, Ohio Power solicited guidance from EPA.

Ohio Power's initial contact with EPA spawned a four-year cooperative effort between the two to conduct the

§ 123(c) demonstration. The demonstration, which cost Ohio Power over one-half million dollars, involved a detailed wind tunnel (fluid model) study examining the effects of wind blowing over a scale model of the Kammer Plant and its surrounding terrain. The study demonstrated that a 900-foot stack at Kammer was necessary to ensure that emissions from the stack do not result in excessive concentrations in the vicinity of the Kammer Plant, and therefore that 900 feet constitutes GEP stack height for Kammer.

During this time, EPA proposed and, in 1982, promulgated regulations to implement § 123.[7] Following promulgation of the those regulations, EPA published a notice in the *Federal Register* pursuant to § 123(c) providing opportunity for comment and public hearing on the Agency's tentative approval of a 900-foot GEP stack height credit for the Kammer Plant.[8] No one objected to the proposed GEP credit, requested a hearing, or even filed comments in response to this notice. On October 6, 1982, almost five years after the demonstration project began, EPA gave final approval to Ohio Power's § 123(c) GEP credit.[9]

Subsequent to EPA's final approval of Kammer's GEP stack height credit, Ohio Power in late 1982 extended the coal contract for the Kammer Plant until mid-1995. Since 1982, Ohio Power and Ormet Corporation, an aluminum smelter that purchases almost all the electricity generated by the Kammer Plant, have conducted operations and long-term planning based upon EPA's finding that the Kammer Plant is entitled to a 900-foot stack height credit under § 123 of the Act. Without this credit,

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[7] 47 Fed. Reg. 5864 (1982).

[8] 47 Fed. Reg. 35784 (1982).

[9] Letter from Glenn Hanson, Acting Chief, Air Programs & Energy Branch, EPA Region III, to Glenn Robinson, counsel for Ohio Power Company (October 6, 1982).

Kammer would face substantially more stringent and more costly emission limitations; Ormet would face closure due to increased costs of power.

III. THE 1985 STACK HEIGHT REGULATIONS

In 1983, the D.C. Circuit remanded portions of the 1982 stack height regulations to EPA, including the definition of "excessive concentrations." [10] The court instructed EPA to consider whether the definition of "excessive concentrations," for purposes of § 123(c) demonstrations, should include a "standard directly responsive to the concern for health and welfare" similar to the one in EPA's 1979 proposal that petitioners in that case had favored.[11] Of particular relevance here is that the § 123(c) demonstration for Kammer had in fact been conducted pursuant to, and had satisfied, the more stringent 1979 proposed definition of "excessive concentrations." [12]

In November 1984, EPA proposed rules containing the 1979 definition of "excessive concentrations" and other § 123(c) demonstration requirements similar to those ap-

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[10] Sierra Club v. EPA, 719 F.2d 436, 450 (D.C. Cir. 1983), *cert. denied sub nom.* Alabama Power Co. v. Sierra Club, 468 U.S. 1204 (1984).

[11] *Id.*; *see id.* at 446 ("[Petitioners] urge a return to a standard like the one EPA originally proposed in 1979"). The 1979 proposal defined "excessive concentrations" for § 123(c) demonstration purposes as a forty percent increase in pollutant concentrations due to downwash *and* an ambient standard or PSD increment exceedance. 44 Fed. Reg. 2608, 2614 (1979). The 1982 rule included only the forty percent test. 47 Fed. Reg. 5869 (1982).

[12] That is, the Kammer demonstration showed that a stack height of less than 900 feet would result in more than a forty percent increase in pollutant concentrations due to downwash *and* would result in an ambient standard exceedance.

plied to Kammer.[13] In the final rule, EPA promulgated the proposed definition of "excessive concentrations" but added, without prior public notice and comment, a totally new requirement for § 123(c) demonstrations.[14]

The new requirement, which substantially impairs the ability of sources to conduct such demonstrations, was not satisfied in the Kammer demonstration. Most significantly in the context of this case, EPA decided that the rule containing the new requirement invalidated the Kammer § 123(c) credit and that the new requirement would apply retroactively to sources like Kammer.[15]

IV. THE D.C. CIRCUIT DECISION

Ohio Power and Ormet challenged before the D.C. Circuit the retroactive application of the new regulation to Kammer. Among other things, Ohio Power and Ormet argued, based upon the D.C. Circuit's recent decision in

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[13] 49 Fed. Reg. 44878, 44881-82 (1984), App. 134a, 147a-150a.

[14] 50 Fed. Reg. 27892, 27907, § 51.1(kk)(1) (1985), App. 131a-132a. The new requirement forces sources to use a "new source performance standard" level of control in § 123(c) demonstrations, even when that standard is not otherwise applicable to the source. *See id.* Ohio Power and Ormet Corporation are among the petitioners for a writ of certiorari filed with the Court on June 17, 1988, in a separate case requesting review of the D.C. Circuit's affirmance of that rule. Alabama Power Co., *et al.* v. Thomas, No. 87-2068.

[15] Since on its face the regulation applies only to sources that conduct § 123 demonstrations *in the future*, there was some question concerning whether EPA actually intended to upset the 1982 demonstrated GEP credit approved for Kammer. Even the EPA Region in which Kammer is located initially questioned whether the final rule had that effect. 51 Fed. Reg. 29268 (1986). Counsel for the Agency maintained in the litigation that the new requirement did apply retroactively so as to revoke the GEP stack height previously approved for Kammer. The D.C. Circuit accepted EPA counsel's contention that the rule upset the Kammer credit. 838 F.2d at 1249, App. 47a.

Georgetown,[16] that EPA could not apply the new regulation retroactively to sources like Kammer that years earlier had completed demonstrations and received from EPA an order approving a GEP stack height credit pursuant to § 123(c).

The D.C. Circuit acknowledged that the new regulation was retroactive because the new "demonstration requirement might impinge unfairly on source owners that made investments or other commitments in reasonable reliance on prior understandings." [17] While the court did not find that § 123(c) explicitly authorizes retroactive legislative rules, the court nevertheless refused to apply the APA proscription against retroactive legislative rulemaking in this case. According to the court, the APA proscription applies to rules, like those involved in *Georgetown*, that affect "*past transactions*," but does not apply to rules, like the § 123 rules, that will lead to "restrictions on plants' *future emissions*." [18]

REASONS FOR GRANTING THE PETITION

As the D.C. Circuit recently confirmed in *Georgetown*, retroactive application of legislative rules is foreclosed by the express terms of the APA.[19] The D.C. Circuit in this case recognized that the APA contains a general proscription against retroactive application of legislative rules to upset past transactions. Nevertheless, without

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[16] Georgetown University Hospital v. Bowen, 821 F.2d 750, 756-57 (D.C. Cir. 1987), *cert. granted*, 56 U.S.L.W. 3590 (U.S. February 29, 1988) (No. 87-1097). In *Georgetown*, the D.C. Circuit held that legislative rules promulgated pursuant to the APA generally cannot be applied retroactively.

[17] 838 F.2d at 1244, App. 35a.

[18] *Id.* (emphasis in original).

[19] Georgetown University Hospital v. Bowen, *supra*, 821 F.2d at 756-57. Certiorari was granted in *Georgetown* specifically on the issue of whether the APA proscribes retroactive application of legislative rules.

finding that § 123(c) explicitly authorizes EPA to promulgate retroactive regulations that adversely affect the legal status of sources with previously approved § 123(c) determinations, the court held that the APA proscription did not apply to the retroactive legislative regulation at issue in this case.

As discussed below, the lower court's distinction between this case and *Georgetown* is wholly lacking in merit. There is no basis in law supporting the court's attempt to create a category of retroactive regulations that fall outside of the general APA and common law proscriptions. Thus, if this Court were to hold in *Georgetown* that the APA or common law principles proscribe retroactive legislative rules unless a statute provides express authority for retroactive rules, the court should grant certiorari in this case and reverse. On the other hand, if this Court were not to reach the APA issue in *Georgetown*, the Court should grant certiorari in this case in order to decide whether the APA proscribes retroactive legislative regulations that undo past administrative transactions.[20]

THIS COURT SHOULD SETTLE THE LAW ON THE SCOPE OF THE APA PROSCRIPTION AGAINST RETROACTIVE LEGISLATIVE RULEMAKING

A retroactive law is one that "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past . . . ."[21] Under regulatory statutes, agencies enter into transactions with regulated parties by making administrative determinations that establish the rights and obligations of those parties, and thus the parties' legal

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[20] Because of the obvious relevance of *Georgetown* to this case, a motion requesting that this Court defer action on this Petition pending resolution of the *Georgetown* case is being filed simultaneously with this Petition.

[21] Society for Propagating the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814).

status, under the regulatory regime. Therefore, a legislative regulation adopted under a regulatory statute is retroactive if it affects or impairs the validity of a previous administrative determination that had established the legal status of a regulated party under that statute.

Under common law principles, a fundamenal rule of statutory construction is that "legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' "[22] This rule of statutory construction applies equally to legislative regulations promulgated to implement statutes.[23]

Codifying this common law principle, the APA provides that a "rule" is "an agency statement of general or particular applicability and *future effect* . . . ."[24] Under the APA, therefore, agencies generally are precluded from promulgating retroactive legislative regulations unless a statute explicitly authorizes the promulgation of such regulations.[25]

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[22] Greene v. United States, 376 U.S. 149, 150 (1964) (quoting Union Pacific R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1933)); *see also* Bennett v. New Jersey, 470 U.S. 632, 639-40 (1985).

[23] Miller v. United States, 294 U.S. 435, 439 (1935). *Cf.* Lyng v. Payne, 476 U.S. 926, 937 (1986) ("[a]n agency's power is no greater than that delegated to it by Congress").

[24] 5 U.S.C. § 551 (1982) (emphasis added).

[25] *See* SEC v. Chenery, 332 U.S. 194, 202 (1947) (distinguishing between the "quasi-legislative promulgation of [general] rules to be applied in the future," and adjudicatory orders that may, in appropriate circumstances, be given retroactive effect); *Georgetown*, 821 F.2d at 757; Retail, Wholesale Department Store Union v. NLRB, 466 F.2d 380; 388 (D.C. Cir. 1972) (legislative rules are "prospective in application only," whereas "rules" (i.e., orders) adopted in the course of agency adjudication may be applied retroactively in appropriate circumstances).

In this case, the D.C. Circuit recognized that the legislative regulations at issue here were retroactive because they would "impinge unfairly on source owners that made investments or other commitments in reasonable reliance on prior understandings." [26] Nevertheless, without finding an express delegation in § 123 authorizing EPA to promulgate regulations that retroactively affect the legal status of sources for which EPA had previously issued an order granting a § 123(c) GEP credit,[27] the court decided that the APA proscription did not apply to the retroactive legislative rules at issue in this case. The only reason offered by the court for this conclusion was that the regulation at issue in *Georgetown* involved "*past transactions*," while "[a]ll that is at stake here are restrictions on plants' *future emissions*." [28]

The D.C. Circuit's refusal to apply the APA proscription against retroactive legislative rulemaking in this case has no basis. At the outset, the court's reference to effects on "future emissions" seems to imply that the legislative rules at issue in this case are *not* retroactive. Yet, in the very next sentence, the court acknowledges that the regulations *are* retroactive where the rules

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[26] 838 F.2d at 1244, App. 35a.

[27] Section 123(c), authorizing EPA to approve greater-than-formula height GEP demonstrations, does not contain any express authority for EPA to promulgate retroactive legislative rules that revoke prior § 123(c) determinations. Nor did the D.C. Circuit find any such explicit statutory authority. *Cf.* United States v. Seatrain Lines, Inc., 329 U.S. 424, 430-33 (1947) (in light of the absence of explicit statutory authority, the Interstate Commerce Commission could not revoke a certificate of public convenience and necessity previously issued to a water carrier); *Georgetown*, 821 F.2d at 758; American Methyl Corp. v. EPA, 749 F.2d 826, 834-40 (D.C. Cir. 1984) (EPA lacks authority under § 211(f) of the Clean Air Act to revoke a fuel waiver issued under that section); Utah International, Inc. v. Andrus, 488 F. Supp. 976, 984-87 (D. Colo. 1980).

[28] 838 F.2d at 1244, App. 35a (emphasis in original).

"impinge unfairly on source owners that made investments or other commitments in reasonable reliance on prior understandings." [29] Applying this standard of retroactivity, the regulations as applied to Ohio Power's Kammer Plant are clearly retroactive.[30]

The court's implication that, unlike in *Georgetown*, no "past transaction" was involved in this case makes no sense. Past administrative determinations are clearly "past transactions" between an agency and a regulated party.[31] Legislative rules that create a new obligation or impose a new duty with respect to such a past transaction are certainly retroactive.[32]

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[29] To the extent the D.C. Circuit's reference to "future emissions" is intended as a comment on the degree of retroactivity involved in this case, the D.C. Circuit's decision cannot be reconciled with an earlier D.C. Circuit decision, Citizens to Save Spencer County v. EPA, 600 F.2d 844, 879-81 (D.C. Cir. 1979). *Spencer County* makes clear that the APA proscription against retroactive legislative rules applies to rules affecting past administrative determinations even when the impact of those rules is on future emissions. In *Spencer County*, the D.C. Circuit considered a challenge to rules that were retroactive to sources that had received construction permits under the Clean Air Act between March 1 and June 19, 1978. As in this case, retroactive application of the regulations would have impinged upon prior investments, but would have done so through the impact of the rules on a plant's "future emissions." Noting the proscription against such retroactive regulations, the court upheld the regulations only because the "good cause" exception in the APA, 5 U.S.C. § 553(d) (1982), applied in the circumstances of the case. *Cf. Georgetown*, 821 F.2d at 757 n.11. That exception does not apply here.

[30] *See also* 838 F.2d at 1251, App. 50a (where the court acknowledges that this case involves "retroactive application of the new demonstration requirement" to Ohio Power).

[31] A "transaction" is broadly defined to include a "proceeding" or an "act or agreement . . . [in] which the legal relations . . . [between parties] are altered." Black's Law Dictionary 1341 (5th ed. 1979). The legal relations between Ohio Power and EPA were clearly altered when EPA approved the above-formula GEP credit for Kammer.

[32] *See supra* note 21.

In short, the lower court's attempt to distinguish this case from *Georgetown* is without merit. Indeed, while the rule in this case revoking the GEP credit will affect Kammer's "future emissions," the rule in *Georgetown* calling for repayment will affect the hospital's "future" cash flow. The critical element in both cases is not the future burdens imposed by the rule, but the fact that the rule seeks to upset a past, completed transaction between the petitioners and the government.

Resolution of the scope of the APA proscription against retroactive legislative rules is important both in the context of this case and in future administrative law cases. In this case, retroactive application of the regulations revokes the stack height modeling credit for the Kammer Plant approved by EPA in 1982 pursuant to § 123(c). This stack height credit continues to have an economic value worth millions of dollars annually. Revocation of the credit could also result in the closure of an aluminum smelter owned by Ormet Corporation,[33] and could result in closure of the coal mine supplying the Kammer Plant, throwing over 2000 persons out of work.

The decision in this case also has significant implications for future administrative law cases. The D.C. Circuit has found, based upon a standardless and illogical distinction, that the APA proscription against retroactive legislative rulemaking does not apply to the retroactive regulations in this case. This precedent will create confusion for courts grappling with the issue of the validity

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[33] Under a contract with Ohio Power, virtually all of the electricity generated by the Kammer Plant is used by Ormet Corporation as a key raw material in the electrolytic production of aluminum. The millions of dollars in additional costs at Kammer resulting from retroactive application of the regulations would therefore fall directly on Ormet. Such a large increase in Ormet's power costs would dramatically impact Ormet's competitive position in the world aluminum market and would threaten the existence of the Ormet smelter.

of retroactive rules in the future. Review by the Court is crucial to resolve the proper scope of the APA proscription against retroactive legislative rulemaking.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the D.C. Circuit should be granted.

Respectfully submitted,

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